UNITED STATES OF AMERICA, Appellant	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	APPELLEE'S MOTION FOR LEAVE TO REPLY TO PROSECUTION'S RESPONSE TO APPELLEE'S MOTION TO ABATE PROCEEDINGS AND APPELLEE'S REPLY
v.	)	Case No. 07-001 Hearing Held[1] at Guantanamo Bay, Cuba on 4 June 2007 Before a Military Commission
OMAR AHMED KHADR, Appellee	)	Convened by MCCO # 07-02 Presiding Military Judge Colonel Peter E. Brownback III

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

Omar Khadr ("Appellee") respectfully requests that this Court allow him to reply to the prosecution's response to his Motion to Abate Proceedings. This reply, which notes additional facts and law relevant to refuting the prosecution's arguments, will be helpful to the Court in resolving Appellee's underlying motion.

Introduction

We now know that even before Appellee filed his Motion to Abate, Captain John W. Rolph, JAG, USN, had identified some of the same defects in the process by which the members of this panel were purportedly appointed to this Court. On 11 July 2007, CAPT Rolph sent an e-mail to the Office of General Counsel, Department of Defense, asking whether the Secretary of Defense had "ratified in writing the Chief Judge/Deputy Chief Judge and military appellate judge

[1] Mr. Khadr has yet to be arraigned.

appointments that were approved by [Deputy] Secretary England on June 15th and May 8th, respectively." Disclosure Concerning Motion to Abate and Motion to Attach Documents at Attachment 1, ***United States*** v. ***Khadr*** (Ct. Mil. Comm'n Rev. July 23,2007) [hereinafter Judicial Disclosure]. CAPT Rolph then observed, "Section 950f of the MCA 2006 states that 'The Secretary shall assign appellate military judges to a Court of Military Commission Review.'" ***Id.*** CAPT Rolph was absolutely correct that the Secretary of Defense, and not the Deputy Secretary, wields the power to appoint this Court's judges—a power that Secretary Rumsfeld exercised himself on 1 December 2006 when he appointed the first four judges to this Court. Yet neither CAPT Rolph's request nor Appellee's Motion to Abate has succeeded in obtaining any documentation suggesting that the Secretary of Defense appointed the military officers who purportedly sit on this panel. Accordingly, the prosecution has not carried its burden of establishing that this panel has jurisdiction to hear Appellee's case, and these proceedings must be abated.

Supplemental Facts[2]

On 11 July 2007, the Clerk of Court sent an e-mail to counsel for the parties in this appeal that included several orders related to this case. One of these orders referred to the assignment of this case by "the Acting Chief Judge." *Khadr* Case Assignment, Attachment C. Shortly after Mr. Foreman sent this e-mail, the Chief Defense Counsel called him and left him a voice-mail message, then called and reached the Deputy Clerk of Court.[3] The Chief Defense Counsel inquired about the creation of the position of the "Acting Chief Judge." The Deputy

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[2] Appellee provides many of these supplemental facts in response to the prosecution's insinuations in paragraphs h and i of its Statement of Facts that the Motion to Abate was untimely. Prosecution Response at 4. The facts establish that at the first point when the prosecution pointedly observes that "[t]he Defense did not challenge the duly appointed judges of this Court at that time," Prosecution Response at 4, the defense had requested but not yet received the documents that gave rise to the Motion to Abate. Three of the undersigned counsel were on an airplane flying to Guantanamo to meet with Appellee at the second point when the prosecution observes that "[a]t the time, Appellee did not question or challenge the composition of the Court." Prosecution Response at 4. This Court should decisively reject the prosecution's insinuations that the Motion to Abate was somehow untimely.

Perhaps by 11 July the prosecution already had copies of all of the relevant documents concerning this Court's creation and the appointment of its judges. Appellee did not. On the contrary, commission defense counsel first learned that judges had been appointed to this Court on 11 July 2007, as the result of the Clerk of Court's e-mail including the names of the three judges assigned to this panel. Despite previous queries to the Convening Authority's office, no commission defense counsel had previously been notified of the 1 December 2006 FOUO document naming four judges to this Court, nor the 8 May 2007 Action Memo purporting to name another 12 judges to this Court, nor the 15 June Action Memo purporting to name a Chief Judge, create the position of Deputy Chief Judge and assign CAPT Rolph to that position.

Almost immediately upon learning of the appointment of the judges of this panel, the Chief Defense Counsel sought relevant documentation from the Deputy Clerk of Court and the Clerk of Court. While those officials suggested the course of action by which Appellee ultimately obtained those documents, they refused to provide those documents to the defense themselves. The prosecution's observation that the defense did not challenge the appointment of this Court's judges when Appellee filed his Motion for Emergency Relief can just as accurately be stated as, "Appellee did not challenge the appointment of this Court's judges at a time when the defense's initial request for the relevant documents had been rebuffed and a second request was pending."

[3] Counsel aver these facts to be true. The Chief Defense Counsel, Col Dwight H. Sullivan, USMCR, is currently out of the area on leave. If requested by either the prosecution or the Court, Appellee will obtain a declaration establishing these facts.

Clerk read to him portions of the 11 June Action Memo from the General Counsel of the Department of Defense to the Secretary of Defense, which was initialed by the Deputy Secretary of Defense on 15 June 2007. Attachment D. The Deputy Clerk declined the Chief Defense Counsel's request to provide a copy of that Action Memo or other paperwork concerning the establishment of the Court of Military Commission Review or the appointment of its judges. While the Chief Defense Counsel was speaking with Deputy Clerk Harvey, Clerk of Court Foreman returned his call. During a subsequent conversation, Clerk of Court Foreman also declined to provide copies of the relevant paperwork to the defense. Either Mr. Foreman, Mr. Harvey, or both suggested that the Chief Defense Counsel seek the documentation from Deputy General Counsel (Legal Counsel) Paul Ney. At 1427 on 11 July, the Chief Defense Counsel sent an e-mail to Mr. Ney noting, in part:

> We received the attached batch of orders from the CMCR today. One of the attached orders refers to the "Acting Chief Judge," a position of which I was previously unaware. This and some internal inconsistencies in the documents (such as indicating that the prosecution appeal was "received by the Clerk of Court on July 4, 2007," while also indicating that the Clerk of Court was not sworn in until 11 July 2007), led me to call both Mark Harvey and Lee Foreman to explore these issues. They indicated that Deputy Secretary England had initialed a document on 15 June 2007 naming Griffin Bell as the Chief Judge and CAPT Rolph as the Deputy Chief Judge and referring to the Deputy Chief Judge's powers.
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> Mark and Lee declined my request to give me a copy of that document and referred me to you instead. Would it be possible for me to get that document, as well as any other documents related to the formation of and appointments to the Court of Military Commission Review? Any guidance would be greatly appreciated.

In an e-mail sent to the Chief Defense Counsel at 1807 on 11 July 2007, Mr. Ney indicated, "I'll pull that material together and hope to get back with you tomorrow morning." At 1909 on 11 July, Appellee's counsel filed a Motion for Emergency Relief, seeking revision of a deadline established by one of the orders that the Clerk of this Court issued on 11 July.

By a disclosure provided to the parties on 23 July 2007, CAPT Rolph informed the parties of the following event that also occurred on 11 July:

> On Wednesday, 11 July 2007, Captain John W. Rolph, JAGC, USN, in his capacity as Deputy Chief Judge of the U.S. Court of Military Commission Review, sent an email to the Office of the General Counsel (OGC), DoD, asking the question:
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> "[Hlas the SecDef ratified in writing the Chief Judge/Deputy Chief Judge and military appellate judge appointments that were approved by Secretary England on June 15th and on May 8th respectively? As you know, Section 950f of the MCA 2006 states that 'The Secretary shall assign appellate military judges to a Court of Military Commission Review.' If it is not too much trouble, it would be useful for the CMCR to have that documentation in hand for the Court's historical record, and in case subsequent validation of our appointments is required."
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> Captain Rolph received a reply on the same day from OGC stating that they were working on the issue. He did not receive any guidance or further documentation.

Judicial Disclosure at Attachment 1.

On 12 July, Mr. Ney sent an e-mail to the Chief Defense Counsel informing him that Mr. Ney had asked David Bennett of his office to send the relevant documents to the Chief Defense Counsel. Mr. Bennett did so at 15:38 on 12 July. At the time, the Chief Defense Counsel was out of the office, executing Permissive TAD orders to attend a training conference. The ***Khadr*** defense team was in the process of preparing to travel to Guantanamo Bay to meet with Appellee, having had to amend their initial plans to travel to Guantanamo earlier on 12 July because U.S. military personnel had supplied them with an erroneous show time for their flight, which necessitated rescheduling the flight for the following day. The Khadr defense team left for Guantanamo on a 0600 flight on 13 July and did not return to the Washington, D.C., area until approximately 1800 on Saturday, 14 July. Appellee's Motion to Abate was filed on Thursday, 19 July 2007 at 0934.

Argument

I

The Military Commissions Act prohibits the Secretary of Defense from delegating his power to assign judges to this Court.

In its opposition to Appellee's Motion to Abate, the prosecution points to only one source of authority by which it purports the Secretary of Defense delegated his power to assign judges to the Court of Military Commission Review: Department of Defense Directive 5105.02 (Feb. 26, 2007). That Directive, however, recognizes that the Deputy Secretary may not act for the Secretary of Defense where doing so is "expressly prohibited by law." DOD Dir. 5105.02 at para. 1.2. Under well-established canons of statutory construction, the Military Commissions Act is deemed to expressly prohibit delegation of the Secretary of Defense's power to assign judges to the Court of Military Commission Review. Accordingly, DOD Directive 5105.02 does not delegate to the Deputy Secretary the Secretary's power to assign judges to this Court.

For the reasons set out in Section II of Appellee's Motion to Abate, the Military Commissions Act prohibits the Secretary of Defense from delegating his power to assign judges to this Court. Appellee observed that at one point in the Military Commissions Act of 2006, Congress expressly authorized the Secretary of Defense to delegate his rule-making power. Yet Congress provided no such delegation authority when it authorized the Secretary of Defense to assign judges to this Court. The prosecution does not even attempt to rebut the resulting conclusion that under "the well-established canon of statutory construction of *expressio* unius est *exclusio alterius*,"[4] the MCA must be construed as denying authority to delegate the assignment power.

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[4] United States *v.* Milan, 304 F.3d 273,293 (3d Cir. 2002).

While the prosecution discusses the Supreme Court's decision in Cudahy Packing Co. *v.* Holland, 315 U.S. 357 (1942), Prosecution Response at 10-11, the prosecution simply ignores the language from that decision that is expressly applicable to construing the Military Commissions Act: "[I]t seems to us fairly inferable that the grant of authority to delegate the power of inspection, and the omission of authority to delegate the subpoena power, show a legislative intention to withhold the latter." Cudahy, 315 U.S. at 364. This language is not limited to statutes about subpoena power any more than *Marbury* v. Madison is limited to judicial review of statutes about issuing mandamus. Rather, the Supreme Court in Cudahy provided guidance on how to construe statutes. Here, that guidance requires that the MCA be construed to limit the power to assign this Court's judges to the Secretary himself.

The prosecution similarly ignores the actual proposition for which Appellee cites United States *v.* Giordano, 416 U.S. 505 (1974). See Prosecution Response at 9-10. In Giordano, the Supreme Court held that one U.S. statute forbade delegation of wiretap application approval authority to the Attorney General's Executive Assistant despite an actual express delegation and 28 U.S.C. § 510's general statutory grant of delegation authority. The Supreme Court reasoned that "[d]espite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." Giordano, 416 U.S. at 514. And the Supreme Court recognized that such a general statutory grant of delegation authority could be overcome even without "precise language forbidding delegation." Id. In Giordano, the general statutory grant of delegation authority was overcome by a negative inference arising from an express delegation of application approval authority to specific Department of Justice officials. Cudahy establishes that a comparable negative inference arises where a statute authorizes one function to be delegated while remaining silent about the delegation of another function. Just as the more

specific negative inference overcame 28 U.S.C. § 510 in Giordano, the more specific negative inference here overcomes 10 U.S.C. § 113(d) and removes the assignment power from DOD Directive 5105.02's scope.

The prosecution also misconstrues United States v. Mango, 199 F.3d 85 (2d Cir. 1999). Prosecution Response at 11-12. In Mango, the Second Circuit declined to apply a negative inference where two *different* statutes treated the subdelegation issue differently. Id. at 91. The Second Circuit contrasted that with a situation like that presented by the MCA:

> Although specific authority to subdelegate one power within a given piece of legislation may indicate that Congress did not intend to allow subdelegation of otherpowers, see, *e.g.*, Cudahy Packing, 315 U.S. 357 at 364, 62 S. Ct. 651, 86 L. Ed. 895, we do not read specific allowance of subdelegation in a different act as a strong indicator of legislative intent in the CWA.

Id. This case presents an instance where the negative inference arises from two different portions of the same statute.

In lieu of addressing Appellee's expressio *unius* argument, the prosecution seeks to chastise Appellee for purportedly "consistently mischaracterize[ing]" the Deputy Secretary of Defense's exercise of the power to assign judges to this Court as "a subdelegation of the Secretary of Defense's authority." Prosecution Response at 9. The prosecution is mistaken both factually and legally. First, in only two paragraphs does Appellee's Motion to Abate refer to the subdelegation of the Secretary's authority under 10 U.S.C. § 950f. See Appellee's Motion to Abate at 11-12. On the other hand, the motion used the verb "delegate" or the noun "delegation" twenty-four times when referring to the Deputy Secretary's exercise of the Secretary's power to name this Court's judges. Nor is use of "subdelegate" incorrect. Federal courts, including the United States Court of Appeals for the District of Columbia Circuit, have referred to Congress's exercise of its constitutional authority to confer the power to appoint inferior officers as

"Congress's delegation of appointment power." Landiy v. FDIC, 204 F.3d 1125, 1133 n.2 (D.C. Cir. 2000); see also, *e.g.*, United States v. Hilario, 218 F.3d 19, 27 (1st Cir. 2000) (referring to Congress's authority to "delegate the appointment power" under the Appointments Clause). Under this formulation, it is perfectly appropriate to refer to the Deputy Secretary's purported exercise of the appointment power that Congress delegated to the Secretary as a subdelegation, just as it is appropriate to refer to the Secretary's subdelegation of the rulemaking authority that Congress delegated to the Secretary in 10 U.S.C. § 949a(a). See, *e.g.*, Loving v. United States, 517 U.S. 748, 770 (1996) (citing UCMJ Article 36 as "indicative of congressional intent to delegate [the] authority [to prescribe the military death penalty system's aggravating factors] to the President") (emphasis added). So whatever solace the prosecution seeks to glean by distinguishing "delegation" from "subdelegation," ***see*** Prosecution Response at 9 n.2 & 11, is illusory.

II

> Any delegation of the Secretary's power to appoint this Court's judges is a change of procedures that may not take effect until 60 days after it has been reported to the House and Senate Armed Services Committees.

The Military Commissions Act authorizes the Secretary of Defense, in consultation with the Attorney General, to prescribe "post-trial procedures . . . for cases triable by military commission." 10 U.S.C. § 949a(a). Before "any proposed modification of the procedures in effect for military commissions" may go into effect, the Secretary of Defense must submit "a report describing the modification" to the House and Senate Armed Services Committee at least 60 days in advance. Id. at § 949a(d) (emphasis added).

The Secretary of Defense carried out that rulemaking function by promulgating the Manual for Military Commissions. The Manual specifically prescribed the procedure for appointing members of this Court: "The Secretary shall appoint appellate military judges to the Court of Military Commission Review pursuant to 10 U.S.C. § 950f." Rule for Military Commissions (R.M.C.) 1201(b)(1). The Secretary could have, but did not, specify that the "Secretary or his delegate" or the "Secretary or the Deputy Secretary" shall appoint appellate military judges. Even if 10 U.S.C. § 113(d) were construed as ***permitting*** a delegation of the Secretary's rulemaking authority, that statutory provision does not ***require*** such delegation. ***A*** Member of Congress reading R.M.C. 1201(b)(1) could construe that language in only one way: the Secretary is reserving the power to appoint this Court's judges to himself.

On 26 April 2007, the Deputy Secretary of Defense promulgated the Regulation for Trial by Military Commissions. Regulation for Trial by Military Commissions at Foreword (2007). The Deputy Secretary expressly promulgated that Regulation pursuant to 10 U.S.C. § 949a(c). ***Id.*** In paragraph 25-2.c of that Regulation, the Deputy Secretary prescribed: "The Secretary of Defense shall appoint military judges to the CMCR from among appellate military judges nominated by each Judge Advocate General and from civilians of comparable qualifications designated by the Secretary." The Deputy Secretary could have prescribed that the "Secretary of Defense or his delegate" or the "Secretary of Defense or Deputy Secretary of Defense" shall appoint this Court's judges. He did not. Again, a Member of Congress reading this language could reach only one conclusion: the Secretary of Defense would personally appoint this Court's judges. This paragraph clearly communicated that to the extent that the appointment power is delegable and to the extent that this appointment power would fall within a broad grant of delegated authority, the Deputy Secretary would not exercise that power but, rather, would reserve that appointment power to the Secretary himself. Indeed, a reasonable

Member of Congress would be aware that the Deputy Secretary could not constitutionally appoint a civilian judge of this Court. *See* Ryder *v.* United States, 515 U.S. 177 (1995). This would suggest a sound reason for the Secretary's decision to reserve the power to appoint CMCR judges to himself.

Significantly, the Deputy Secretary issued the Regulation after the most recent iteration of DOD Directive 5105.02 (Feb. 26, 2007), was promulgated. The Deputy Secretary's appointment of the judges on this panel was clearly inconsistent with the plain meaning of Paragraph 25-2.c of the Regulation. It clearly constituted a change in the procedure for appointing this Court's judges. But the Deputy Secretary was not free to change that procedure without congressional oversight. Appellee is unaware of whether the relevant congressional committees have ever been notified of this change to Paragraph 25-2.c, as well as R.M.C. 1201(b)(1). But because the Deputy Secretary's purported appointment of the judges on this panel occurred less than 60 days after he promulgated Paragraph 25-2.c, it is certain that no change allowing the Deputy Secretary to appoint this Court's judges had taken effect on 8 May 2007, when he purported to do so. See Attachment B.

III

The creation of the Deputy Chief Judge position with purported authority to act on behalf of the Chief Judge was a change to the originally promulgated commission post-trial procedures, requiring notification to Congress 60 days before it may take effect.

The prosecution's attempt to prove that the position of "Acting Chief Judge" preceded the Deputy Secretary of Defense's 15 June 2007 attempt to create the position of "Deputy Chief Judge" actually demonstrates the opposite.

Initially, the prosecution observed, "Notably, Appellee does not challenge the qualifications of Judge Rolph or, for that matter, any of the other members of the Court or the panel." Prosecution Response at 13. That contention is perplexing, as the Motion to Abate challenges the appointment to this Court of every judge assigned to this panel. Let there be no mistake: Appellee expressly challenges the qualifications of every judge on this panel since one of the most basic qualifications to wield judicial power is a proper appointment to the court.

The prosecution then argued that CAPT Rolph "acted within his inherent authority to assign the military judges to the panel hearing this case" because "first, the next senior person in the organization succeeds if the incumbent, in this case the Chief Judge, is absent." Prosecution Response at 13, 14. But this argument actually devastates the prosecution's position because, in fact, CAPT Rolph is not the "next senior person" on this Court. On 1 December 2006, Secretary Rumsfeld appointed four judges to this Court: the Honorable Griffin Bell, the Honorable William T. Coleman, Jr., the Honorable Edward *G.* Biester, Jr., and the Honorable Frank J. Williams. See Attachment A. Each of these four judges is thus senior on the Court compared to CAPT Rolph and the other 11 judges the Deputy Secretary purported to appoint on 8 May 2007. So the prosecution's argument proves that the Deputy Secretary's 15 June action changed the method of determining an "Acting Chief Judge" that existed before that Action Memo "create[d] the position of Deputy Chief Judge of the CMCR." Attachment D. But such a change cannot take effect until 60 days after it has been reported to the relevant congressional committees. 10 U.S.C. § 949a(d).

As a secondary argument, the prosecution posits that Deputy Secretary England was an appropriate authority to designate an Acting Chief Judge. Prosecution Response at 14. But regardless of whether Deputy Secretary England was or was not empowered to "create the

position of Deputy Chief Judge,"[5] in the words of the General Counsel of the Department of Defense, that creation changed the procedures governing the CMCR, as both Appellee's original motion to abate and the prosecution's own argument demonstrate. Before this creation, only the Chief Judge was authorized to execute certain important functions, such as assigning judges to a panel and cases to a panel. After this creation, either the Chief Judge or, in his absence, a Deputy Chief Judge acting as Chief Judge could exercise this function. Before this change, under the prosecution's reasoning, the second-most senior judge could perform this function in the Chief Judge's absence. After this change, a judge with less seniority on the Court would have precedence over three of the four former temporary Major Generals (including two former Cabinet members, who are four-star equivalents, ***see*** Department of Army Protocol Precedence List, Apr. 8,2003, available at http://www.usma.edu/Protocol/images/DA_precedence.pdf, and a state Supreme Court chief justice) who were appointed on 1 December 2006. For purposes of 10 U.S.C. § 949a(d), it does not matter whether this change was wise or unwise, or even whether this change was promulgated by the proper official. What matters is it was a change, and such a change requires congressional notification before it may take effect. Until 60 days have elapsed from when this change was or will be reported to the relevant congressional committees, the status quo ante remains. Only the Chief Judge or, under the prosecution's theory, in his absence the second most senior member of the Court may assign judges to panels and may assign this case to a panel. Neither of those events has occurred. Rather, assuming arguendo a proper appointment, a judge junior to the Chief Judge and three other judges attempted to wield power reserved to the Chief Judge. Accordingly, the assignment of judges to this panel and the

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[5] Attachment D (emphasis added).

assignment of this case to this panel are void. Proceedings must be abated until these defects are cured.

Conclusion

For the foregoing reasons, Appellee respectfully requests that this Court grant his motion to reply to the prosecution's response and abate proceedings in this case until such time as the applicable statutory and regulatory requirements are satisfied.

Respectfully submitted,

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PANEL No. _____

GRANTED (signature) _____

DENIED (signature) _____

DATE _____

Certificate of Service

I certify that a copy of the foregoing was sent via e-mail to Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 26 July 2007.

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